and without notice to counsel in other cases, the District Court appointed the plaintiffs in both *Thurber* and *Dusek* (the same plaintiffs in both cases) lead plaintiffs in both cases and appointed their counsel, the self-styled Executive Committee, lead counsel for both. According to decisions by this Court, courts of appeal, and district courts, this created two conflicts of interest.

Raising both the violation of the statutory stay and the conflicts of interest for the lead plaintiffs and the lead counsel, Petitioner moved for reconsideration of the ruling. Saying, "If I made a mistake, I can cure it later," the district court denied the motion for reconsideration. Two months later the Judicial Panel on Multidistrict Litigation transferred all cases relating to the merged companies to the judge who violated the stay and created the conflicts.

The lead plaintiffs in both classes, Birmingham Retirement & Relief Fund and the DeLoziers (collectively "Birmingham"), moved to certify both classes with themselves as class representatives for both classes and the Executive Committee, the firm of Milberg, Weiss, Bershad, Hynes & Lerach (the "Milberg firm") as chairman of the Executive Committee, as class counsel for both. Defendants-respondents stipulated to the motion.[1] Petitioner opposed Birmingham's motion and stipulation on the ground that, because representation of both classes presented a conflict, Birmingham and the

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[1] In their initial opposition papers defendants demonstrated that two of the proposed class representatives misrepresented the number of shares they owned. This was not the first time the Milberg firm misrepresented the number of shares owned by or the losses suffered by its plaintiffs. *See In re BankAmerica Corp., Sec. Litig.*, 95 F.Supp.2d 1044 (E.D. Mo. 2000) (Milberg represented that its client owned 95,678 shares when it actually owned only 28,678 shares); *In re Network Assoc., Inc., Sec. Litig.*,76 F.Supp.2d 1017 (N.D. Cal. 1999) (Milberg's certificates included "numerous discrepancies, rang-

Executive Committee could not adequately and independently represent the two classes. The district court approved Birmingham's stipulation.

The Executive Committee conducted discovery, refused to allow access to the discovery by other class members who requested it, then negotiated a single "global settlement" for both cases; but the members of the Committee could not agree on the division of the settlement fund between the two classes. Two representatives of the Executive Cor mittee agreed to abandon the duties and responsibilities they owed to both classes, gave the duties and responsibilities to a single unrelated person, and asked the person to allocate the Settlement Fund between the two classes. Without any rationale[2] the

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ing from unsigned forms, to forms refusing to be lead plaintiff, to trades that could not have occurred as represented"); *In re Oxford Health Plans, Inc., Sec. Litig.*,199 F.R.D. 119, 121-122 (S.D.N.Y. 2001) (Milberg changed one of its client's losses from $3,409,423.11 to $917,000 after six other potential lead plaintiffs had withdrawn); *Stanley v. Safeskin*, Index No. 99cv0454-BTM (LSP) (S.D.N.Y.) (Milberg's first client failed to list on its Certificate approximately 72% of the trades it made during the proposed class period and the second proposed lead plaintiff failed to list more than 70% of his trades); *Kassin v. VA Linux Sys.*, Index No. 01 Civ 2085 (MGC) (S.D.N.Y.) (Milberg showed its client's losses at $2.4 million, but the proposed lead plaintiff 's second declaration showed that to be an overstatement); *Steiner v. Aurora Foods, Inc.*, Index No. C 00-0602CW (N.D. Cal.) (two of Milberg's lead plaintiffs were forced to reduce their losses from $4,183,595.88 collectively, to $66,000 and $68,000 individually, totaling $134,000); *California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 127 F.Supp.2d 572, 580 (D.N.J. 2001) (Milberg proposed a candidate that had not purchased stock during the class period).

[2] Lead counsel never explained the positions taken on behalf of the two classes before or during the allocation negotiations and have, to the contrary, made every effort to cloak the allocation in secrecy. Petitioner sought discovery relating specifically to the allocation, counsel for the classes moved to quash, the magistrate judge

"mediator" divided the fund evenly between the two classes. Class counsel treated the division of the fund as if it were a binding determination and a state secret, affirmatively denying class members any information about the division. Over objection by Petitioner, the district court approved the settlement and the division and ordered attorneys' fees and expenses paid from the global settlement fund. In effect, each member of both the *Dusek* and the *Thurber* classes will pay the counsel fees for all members of the Executive Committee.

Petitioner objected to the settlement, again raising the conflicts of interest, which had now leaped from "potential" conflicts to actual conflicts by the failure to settle the two class claims separately and by counsels' abandonment of the separate duties and responsibilities they owed to each class. The district court approved the settlement, and Petitioner appealed.

The Court of Appeals: The United States Court of Appeals for the Ninth Circuit recognized that a conflict existed, saying that Petitioner "overstate[d] the degree to which there was a potential or actual conflict of interest." In practical effect, it held that a "small" conflict could continue uncured, and authorized judicial supervision of conflicts as the standard under Rule 23(a)(4). According to the Ninth Circuit, the law does not require that the conflict be cured when it has been recognized. The court did not consider any principles of law, including the two governing landmark decisions by this court on conflicts and independent representation under Federal Rule 23(a)(4); did not review the legal issues governing conflicts; and buried the questions of law by

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granted the Executive Committee's motion. Petitioner filed timely objections to the magistrate judge's order. The district court ignored Petitioner's objections and never ruled on them.

applying an abuse of discretion standard of review when the issues required a *de novo* standard.[3]

REASONS FOR GRANTING THE WRIT: THE DECISIONS BELOW DENIED BOTH CLASSES INDEPENDENT REPRESENTATION

Class actions efficiently adjudicate large numbers of similar small cases by replacing the host of claimants with representative parties and notice. The absence of individual involvement, the unsavory practice of buying representative parties,[4] and the dilution of the adversarial system[5] abuse the class members' rights and jeopardize representative litigation.

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[3] A district court's application of the ethics rules and its legal conclusions should be reviewed *de novo*. *See Muncy v. City of Dallas*, 335 F.3d 394, 402 (5th Cir. 2003); *U.S. v. Bolden*, 353 F.3d 870, 878 (10th Cir. 2003); *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 145 (4th Cir. 1992); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 588 (3d Cir. 1999); *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1088 (3d Cir. 1976); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1154 (8th Cir. 1999).

[4] The Milberg firm is presently the subject of an investigation by a federal grand jury in California relating to "whether secret, illegal payments were made by the [Milberg] firm to plaintiffs whose names repeatedly appeared on securities class-action lawsuits brought by the firm . . . ." John R. Wilke and Scot J. Paltrow, *Prosecutors Step Up Probe of Milberg Weiss Law Firm*, The Wall Street Journal, August 8, 2005, at A1.

[5] Quite reasonably, defendants wish to settle for the smallest amount, i.e., at most, the insurance coverage. Plaintiff class operates through the captive class representative; and with fees in the offing, the Milberg firm virtually always settles for the insurance policy limits as it did here. Plaintiffs-respondents and defendants-respondents argued below that the amount of the settlement justified their level of misconduct; but in fact the amount of the settlement, the policy limits, is tiny compared to the billions of dollars of losses sustained by the stockholder class members. For example, although defendant Jill

Abuses by class counsel have led this Court and Congress to take action. *See* 2003 Amendments to Rule 23 of the Federal Rules of Civil Procedure[6]; Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) and the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

Here, the Executive Committee could not properly negotiate a settlement for one class while it represented the other class. Certainly, the Executive Committee could not properly negotiate a lump sum settlement for both at once as it did in this case. Finally, the Executive Committee could not allocate the "Global Settlement" proceeds, nor could it abandon its dual sets of duties and responsibilities to a non-judicial (or even a judicial) mediator.

Federal Rule of Civil Procedure 23 presents the District Court with many well concealed pitfalls and a far greater burden than a right-turn-rear-end-bang case. Who provides the Court its best relief from all this? Experienced plaintiff's counsel. What plaintiff's firm has the most experience? The Milberg firm, Chairman of the Executive Committee and lead counsel.[7] Here, the dis-

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Barad, Chief Executive Officer of Mattel at the merger, received $50,000,000 in parachute compensation when she departed a short time later, she contributed nothing to the settlement.

[6] Proposed amendments to Rule 23 of the Federal Rules of Civil Procedure were published for public comment and recommended to the Supreme Court by the Judicial Conference. This Court approved the proposed amendments and submitted them to Congress in March 2003. *See* U.S. Court, Federal Rulemaking, Past Rules Amendments, *http://www.uscourts.gov/rules/archives.htm.* The amendments became effective December 1, 2003.

[7] By some accounts "[s]ince 1995 [Milberg Weiss] have handled half of all class actions alleging securities fraud." Robert Lenzner and Emily Lambert, *Mr. Class Action*, Forbes, February 16,

trict court condoned a conflict in order to take the lazy route of giving the two classes to the Milberg firm, then used the standard review devices—essentially none at all—to rubber stamp the Milberg firm's settlement[8] . . . and substituted nominal judicial supervision of conflicts of interest for cure of conflicts.[9]

The district court should have required a cure. *See, e.g., In re Cendent Corp. Sec. Litig.*, 124 F.Supp.2d 235 (D.N.J. 2000); *Ryan v. Aetna Life Ins. Co.*, 765 F.Supp. 133 (S.D.N.Y. 1991). Nevertheless the issue and its parallel issue, i.e., buying or bribing class representatives, occur often without being litigated or reported. The Milberg firm apparently bought or bribed its representative plaintiff in at least fifty cases by paying him more than

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2004, at 82. Other reports claim that "[i]n any given year, Milberg Weiss files the lion's share of shareholder suits throughout the country. In 2000, the Milberg Weiss name was on 149 of 206 such suits filed in federal courts." Tom McGhee, *Crusader or Blackmailer? Lerach's suits hailed by shareholders, feared by corporations*, Denver Post, August 19, 2001. This means that, if this Court reviews the decision below, it will not be vindicating the rights of litigants in one case but will be dealing, through the Milberg firm, with most of the many shareholder suits in the country.

[8] The district court's blind reliance on the Milberg firm is shown by its use, verbatim, of the firm's proposed findings and conclusions, an unacceptable practice. Findings of fact and conclusions of law drafted by one party should not be adopted by the district court and should be subject to greater scrutiny by an appellate court. *See Helash v. Ballard*, 638 F.2d 74, 75 (9th Cir. 1980); *Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 980 (9th Cir. 1980); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977).

[9] The judiciary's cursory review of class action settlements has already drawn the unfavorable attention of Congress in the Class Action Fairness Act of 2005, *supra*. *See, e.g.*, 28 U.S.C. § 1712 (requiring judicial scrutiny of class action settlements providing payment of coupons to class members). This Court should bar supervision, require cure, and demand more scrutiny by the lower courts.

two million dollars. This led to the recent indictment of that individual on federal charges.

The district court made compliance with the Rule 23(a)(4) requirement that "the representative parties . . . fairly and adequately protect the interests of the class" impossible and the Rule 23(g)(1)(B) requirement that "[a]n attorney appointed to serve as class counsel [ ] fairly and adequately represent the interests of the class" impossible. The adequacy of representation requirement "serves to uncover conflicts of interest" in thousands of class actions. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *In re N. Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 855 (9th Cir. 1982); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Adequacy of representation by the claimant and counsel is more than a requirement of the Rules; it is a federal constitutional requirement:

> The importance of determining adequate representation cannot be understated [sic]. The rule that the representative must fairly and adequately represent the class is one of constitutional magnitude. This is due to the binding effect of derivative and class actions on absent class members. . . .

Guenther v. Pacific Telecom, Inc., 123 F.R.D. 341, 344 (D. Or. 1987); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The District Court applied and the Ninth Circuit approved a bizarre principle for conflicts of interest, supervision rather than cure: according to the Ninth Circuit, "to the extent there may have been a potential or actual conflict of interest" the District Court . . . "took precautionary measures sufficient to protect the interests of the *Dusek* class." The District Court merely appointed one member of the Executive Committee to be "pri-

marily responsible" for one of the classes.[10] It should have required separate, independent counsel and should have made "primarily responsible" counsel independent of lead counsel, the Chairman of the Executive Committee. It did not. This conflicts with this Court's decisions in *Ortiz*, *supra*, 527 U.S. at 846, and *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997), both class actions.

In *Ortiz*, the parties negotiated a global settlement, filed a lawsuit, and sought class certification for settlement purposes. *Ortiz*, 527 U.S. at 824-26. The district court certified the class and approved the global settlement. The court of appeals found "no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation" and affirmed. *Ortiz*, 527 U.S. at 829. In effect, both courts found "minor" conflicts insufficient to defeat the settlement. Requiring that the lower courts cure conflicts, not supervise (an absurdity) them, this Court reversed, noting that "two aspects in particular of the District Court's certification should have received more detailed treatment by the Court of Appeals:"

First, "the District Court took no steps at the outset to ensure that the *potentially* conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses . . . relying instead on its *post hoc* findings at the fairness hearing that these subclasses in fact had been adequately represented." *Ortiz*, 527 U.S. at 831-32. Like the Ninth Circuit, the Fifth Circuit in *Ortiz* relied on district court supervision

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[10] The Executive Committee is analogous to a law firm; and the law firm, not the single attorney in charge of the case, represents the client. If one attorney in a firm has a conflict, all attorneys in the firm become infected with the conflict. *Flatt v. Superior Court*, 9 Cal. 4th 275, 283, 885 P.2d 950, 954, 36 Cal. Rptr. 2d 537, 541 (Cal. 1994).

of representatives and counsel with conflicts rather than cure of conflicts at the time of conflict recognition; and

Second, "any assumption that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated [a] separate settlement" on behalf of other clients who had simultaneous claims against the same defendant. *Ortiz*, 527 U.S. at 852. According to this Court, having already negotiated a settlement, counsel "had great incentive to reach any agreement in the settlement negotiations," 527 U.S. at 852, because "with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant." *Ortiz*, 527 U.S. at 853 n. 30. Here, having already negotiated a large "global settlement" for the value of the policies, counsel could expect large fees no matter how the global fund might be divided between the two classes. But the "global settlement fund" had to be divided or counsel would receive no fees. Hence, counsel abandoned their single-minded, independent representation of the two classes, transferred their responsibilities to a "representative" not selected by either class, and assured themselves that the global settlement (plus fees) would not fail.

Citing *Amchem*, *supra*, this Court held in *Ortiz* that, when conflicting interests exist, differences must be addressed by a cure, i.e., creation of separate class divisions with separate and independent representation "to *eliminate* conflicting interests of counsel (emphasis supplied)." *Ortiz*, 527 U.S. at 856; *see also Amchem*, *supra*, 521 U.S. at 626-27; *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159-161 (1982); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 741-744 (2d Cir. 1992), *mod. on reh'g*, 993 F.2d 7 (2d Cir. 1993).

To treat conflicts the Ninth Circuit approved supervision rather than cure, then abandoned everything to the district court, saying "the district court was in a better position to evaluate the advocacy by the class counsel and the class representatives than are we . . . ." This was precisely the solution rejected by this Court in *Ortiz*. Worse yet, in this case, the District Court did not bother to consider any ethical rules. The Ninth Circuit, however, should have considered the legal questions regardless of the District Court's failure.

Congress was well aware of class counsel abuses, which fall particularly hard on absent class members, and tried to control them when it passed the Private Securities Litigation Reform Act, *supra*, and the Class Action Fairness Act of 2005, *supra*. *See In re Waste Mgmt., Inc. Sec. Litig.*, 128 F.Supp.2d 401, 411 (S.D. Tex. 2000):

> "In passing the PSLRA in December 1995, Congress was reacting to significant evidence of abusive practices and manipulation by class action lawyers of their clients in private securities lawsuits." [Citations omitted.]

Absent class members generally do not monitor their cases because their claims are relatively small in value or because they believe the named representatives will protect their interests.[11] *See In re General Motors Corp.*

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[11] The fiction this produces is graphically illustrated by the principles of law used by district and circuit courts to review settlements, particularly the cursory treatment given to objectants by the court. *See, e.g.*, Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case For Reform*, 73 Neb. L. Rev. 646, 650, 682-83 (1994); Public Citizen, Congress Watch, civjus/class_action/articles.cfm? ID=5329; *Adams v. Rose*, 2003 WL 21982207 (2d Cir. Aug. 20, 2003); *In re Lloyd's American Trust Fund Litig.*, 2002 WL 31663577 (S.D.N.Y. Nov. 26, 2002).

Pick-up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768, 784 (3d Cir. 1995); *In the Matter of American Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988); *Mars Steel Corp. v. Continental Illinois Nat'l Bank and Trust Co. Of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987). In this case, it would not matter if they did because the Milberg firm would refuse them access to anything.

Even the class representatives do not monitor the class suit, making the lawyers "close to the real parties in interest." *Mars Steel*, 834 F.2d at 679; *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1309 & n.7-8 (3d Cir. 1993); *American Reserve Corp.*, 840 F.2d at 490. The potential for abuse of the class action becomes greatest of all in the settlement context, *see* 28 U.S.C. §§ 1711-1715, because the interests of plaintiffs' counsel shift to large fees. *American Reserve Corp.*, 840 F.2d at 490; *Mars Steel*, 834 F.2d at 681. By burying the conflict here and avoiding a cure of the conflict (independent counsel for both classes), the Milberg firm doubled its fees.[12]

Lead counsel and Chairman of the Executive Committee was the Milberg firm,[13] the "robber barons" of plaintiffs class action securities firms. The Milberg firm has consistently shown its belief that the PSLRA does not govern its actions and can be ignored:

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[12] When the District Judge appointed the Milberg firm chairman of the Executive Committee, it prepared to pay the award of fees and expenses, under customary practice, to the Milberg firm alone. When it appointed an Executive Committee firm to have "primary responsibility" for the other class, it created a farce. Beholden to lead counsel in the division of the fees and expenses, it would not perform an adversary role to defend the rights of its client against lead counsel; and here it did not (it abandoned its adversary duties to a "mediator").

[13] Milberg Weiss has since split into two firms. Both firms are listed as counsel in *Dusek*.

(a) *California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 127 F.Supp.2d 572, 580-81 (D.N.J. 2001) (Milberg's "conduct contravenes both the letter and spirit of the PSLRA" and its "self-promotional material further diminishes the effectiveness of notices published under the PSLRA because it undermines the PSLRA's goal of bringing forward independent competing class members.");

(b) *In re BankAmerica Corp. Sec. Litig.*, 95 F.Supp.2d 1044, 1050 (E.D. Mo. 2000) (Milberg does "not have the best interests of the class at heart and have proved themselves wholly inadequate to control the conduct of this suit," "Milberg Weiss's behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent," and "Milberg's state case was "nothing more than a thinly-veiled attempt to circumvent federal law.");

(c) *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F.Supp.2d 1239, 1243 (N.D. Cal. 2000) (Milberg's solicitation efforts were "a particular evil of past securities litigation. . . ."); and

(d) *In re Waste Management, Inc. Sec. Litig.*, 128 F.Supp.2d 401, 419, 424 (S.D. Tex. 2000) (a past client accused Milberg Weiss of "a pattern of disloyalty to its clients and placing its own financial interests above those of its past and current clients").

The conflicts of interest in this case, which were sanctioned by both the District Court and the Ninth Circuit, occur often, especially for the benefit of the Milberg firm. A ruling for the class here and recapture of the fees (already distributed long ago under the "quick pay" clause in the settlement agreement, a Milberg special) would deter this widespread abusive practice. In the alternative the Milberg firm will continue to rely on the superficial review and blind reliance given to settlements, by both the district courts and the courts of appeal, particularly at the appellate level.

CONCLUSION

The good of the bar, the interests of unnamed class members, and public confidence in the legal process warrant this Court's intervention. Perhaps my forty plus respectful years at the bar will justify a brief outburst of professional complaint. Congress can tinker all it likes with statutes . . . to no end. The solution rests in the hands of the judiciary . . . the moribund, inactive judiciary. Thirty years in the defense bar surrounded me by the highest standards of practice. Ten years of the most disgusting practice by my new colleagues of the plaintiffs contingent fee class action bar followed. We have tried to do it right. We have watched in vain as ruling after ruling ignored or condoned improper practice. A little Kafka, is it? We know we were right in both courts below. Are we to be frustrated again and see bad conduct rewarded as a result of non-intrusive, superficial, and meaningless methods of review or crowded calendars at court levels whose function is not to vindicate rights in litigation? We respectfully request that the Court grant the petition and review this case . . . and, at last, sound

reveille for better standards of conduct by the bar. For these reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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October 27, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-56872
D.C. No. CV-99-10864-MRP

FRANK A. DUSEK, On behalf of himself and all other similarly situated; *et al.*,

Plaintiffs-Appellees,

MEL SCHIFF,

Appellant,

—v.—

MATTEL INC.; *et al.*,

Defendants-Appellees.

JUDGMENT

Appeal from the United States District Court for the Central District of California, Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 07/29/05

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed July 29, 2005

No. 03-56872
D.C. No. CV-99-10864-MRP

FRANK A. DUSEK, on behalf of himself and all other similarly situated; HUGH DELOZIER, Dr. & Mrs.; STATE STREET BANK; BIRMINGHAM RETIREMENT & RELIEF FUND,

Plaintiffs-Appellees,

MEL SCHIFF,

Appellant,

—v.—

MATTEL INC.; JILL E. BARAD; HARRY J. PEARCE; MICHAEL PERIK; HAROLD BROWN; JOSEPH C. GANDOLFO; TULLY M. FRIEDMAN; NED MANSOUR; RONALD M. LOEB; ANDREA RICH; WILLIAM D. ROLLNICK; PLEASANT T. ROWLAND; CHRISTOPHER A. SINCLAIR; JOHN L. VOGELSTEIN; BRUCE L. STEIN,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted April 4, 2005
Pasadena, California

Before:

T.G. NELSON, W. FLETCHER, and BEA,
Circuit Judges.

Objector-Appellant Mel Schiff appeals from the district court's order granting final approval of a proposed global settlement of both this class action and the related class action in *Thurber* v. *Mattel, Inc.*, D.C. No. CV-99-10368-MRP (C.D. Cal.). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm. Because the parties are familiar with the factual and procedural history, we do not repeat it here except to the extent necessary for our disposition.

I.

Schiff first argues that the district court erred in granting final approval of the proposed settlement because neither the class counsel nor the class representatives were adequate representatives of the *Dusek* class as

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

required by Rule 23(a)(4) of the Federal Rule of Civil Procedure. We review the district court's order granting final approval of the proposed settlement—including its determination that the class counsel and the class representatives were adequate—for abuse of discretion. *Staton* v. *Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). For the reasons set forth below, we conclude that the district court did not abuse its discretion.

First, Schiff overstates the degree to which there was a potential or actual conflict of interest between the *Dusek* class and the *Thurber* class. As Schiff conceded at oral argument, there is likely "considerable overlap" between the two classes.

Second, to the extent there may have been a potential or actual conflict of interest, the district court took precautionary measures sufficient to protect the interests of the *Dusek* class. Specifically, the district court charged the law firm of Wolf Popper LLP with the responsibility of being "primarily in charge of prosecuting the *Dusek* § 14(a) case." Further, the district court appointed the DeLoziers as one of the two class representatives, and the plaintiffs represent without objection by Schiff that the value of the DeLoziers' § 14(a) claim "far exceeded" and was "much larger" than that of their § 10(b) claim.

Third, the district court was in a better position to evaluate the advocacy by the class counsel and the class representatives than are we, and it found that "Wolf Popper LLP vigorously prosecuted the *Dusek* action and zealously represented the interests of the *Dusek* Class members." It likewise found that "[t]he Class Representatives vigorously prosecuted the *Thurber* action and the *Dusek* action and are adequate representatives of the Classes."

By contrast, the only concrete example that Schiff offers as evidence that the representation afforded by the

class counsel and the class representatives was inadequate is the allocation of the settlement fund.[1] However, the record suggests otherwise. To begin, we are not persuaded, as Schiff argues, that the § 14(a) claims raised by the *Dusek* class were necessarily more valuable than the § 10(b) claims raised by the *Thurber* class such that had the *Dusek* class been adequately represented, it would have received a larger share of the proposed settlement than did the *Thurber* class. In any event, the settlement allocation was proposed by a court-appointed mediator rather than the class counsel or the class representatives that were allegedly conflicted. Moreover, even if it is true that the § 14(a) claims brought by the *Dusek* class were easier to litigate, Schiff fails to acknowledge that members of the *Dusek* class are expected to receive eight cents—about 18.6 percent—more per share than will members of the *Thurber* class. Further, Wolf Popper represents without objection by Schiff that the $61 million settlement for the *Dusek* class is "one of the largest settlements of a 14(a) claim ever." Finally, we note that only 15 class members accounting for about 500 shares of Mattel opted out of the settlement, the Schiff Group's was the only objection to the terms of the proposed settlement (as opposed to the fee applications), and Schiff himself, who we understand owns no more than 30 shares of Mattel, is the only remaining objector.

Accordingly, the district court did not abuse its discretion in granting final approval of the proposed settlement.

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[1] At oral argument, Schiff contended that the conflict of interest necessarily manifested earlier, but, despite repeated questioning, provided no concrete examples.

II.

Schiff also argues that the magistrate judge erred by quashing the Schiff Group's notices of deposition and subpoenas and by precluding further such discovery regarding the settlement negotiations. We review such a denial of a request for discovery for abuse of discretion, *Lobatz* v. *U.S. West Cellular of California, Inc.*, 222 F.3d 1142, 1147 (9th Cir. 2000), and hold that the magistrate judge did not abuse her discretion.

We noted in *Lobatz* that "[s]ettlement negotiations involve sensitive matters" and, thus, held that " 'discovery [of settlement negotiations] is proper only where the party seeking it lays a foundation by adducing from other sources evidence indicating that the settlement may be collusive.' " *Id.* at 1148 (quoting *Mars Steel Corp.* v. *Continental Illinois National Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987)). Assuming without deciding that *Lobatz* permits discovery where, as here, the allegation is not that the class counsel and the class representatives colluded with the defendants but that they labored under a conflict of interest, for the reasons noted in Part I above, Schiff has failed to make the requisite foundational showing.[2]

AFFIRMED.

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[2] Having so concluded, we need not address whether the Ninth Circuit should recognize a federal mediation privilege and, if so, whether it applies here.

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Executive Committee

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Filed September 29, 2003
Master File No. CV-00-2684-MRP(CWx)
CLASS ACTION

FRANK A. DUSEK, et al., On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

—VS.—

MATTEL, INC., *et al.*,

Defendants.

DATE: September 10, 2003
TIME: 11:00 a.m.
COURTROOM: The Honorable
Mariana R. Pfaelzer

FINAL JUDGMENT AND ORDER
OF DISMISSAL WITH PREJUDICE

This matter came before the Court for hearing pursuant to the Order of this Court, dated June 30, 2003, on the application of the parties for approval of the settlement set forth in the Stipulation and Agreement of Set-

tlement dated as of November 21, 2002 (the "Stipulation"). Due and adequate notice having been given to the *Dusek* Class as required in said Order, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Judgment incorporates by reference the definitions in the Stipulation, and all capitalized terms used herein shall have the same meanings as set forth in the Stipulation.

2. This Court has jurisdiction over the subject matter of the *Dusek* Action, including all matters necessary to effectuate the settlement, and over all parties to the *Dusek* Action, including all Members of the *Dusek* Class and the Defendants.

3. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court hereby finally certifies a Class consisting of: all stockholders of Mattel, Inc. ("Mattel" or the "Company") (other than those Persons who timely and validly requested exclusion from the *Dusek* Class) who owned shares of the common stock of Mattel as of March 15, 1999, the record date for the vote on approval of a merger between Mattel and The Learning Company, Inc. ("The Learning Company" or "TLC"). Excluded from the *Dusek* Class are the Defendants, each of a Defendant's present and former parents, subsidiaries, affiliates, and its or their present and former officers, directors, representatives, spouses and immediate family members, Goldman Sachs & Co., Merrill Lynch, Wachtell, Lipton, Rosen & Katz (and its partners), Munger, Tolles & Olson LLP (and its partners), Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. (and its shareholders), Milbank, Tweed, Hadley & McCloy (and

its partners), PricewaterhouseCoopers (and its partners), and the predecessors, heirs, successors, and assigns of any of them, any Person or entity in which any such Person has or had a controlling interest or which is or was related to or affiliated with any such Person, and any trust of which any Defendant is the settlor or which is for the benefit of any Defendant and/or a member(s) of a Defendant's family.

4. Except as to any individual claim of those Persons (identified in Exhibit 1 hereto) who have validly and timely requested exclusion from the *Dusek* Class, the *Dusek* Action and all claims contained therein, as well as all of the Released Claims are dismissed with prejudice. The Settling Parties are to bear their own costs, except as otherwise provided in the Stipulation.

5. The Court finds that the Stipulation and settlement are fair, just, reasonable and adequate as to each of the Settling Parties, and hereby finally approves the Stipulation and settlement in all respects and the Settling Parties are to perform its terms to the extent the Settling Parties have not already done so.

6. Upon the Effective Date each of the Representative Plaintiffs and Lead Plaintiffs and each of the *Dusek* Class Members shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever released, relinquished and discharged all Released Claims and any and all claims relating to or arising out of, or in connection with the settlement or resolution of the *Dusek* Action against all of the Released Persons, whether or not such Representative Plaintiff, Lead Plaintiff or *Dusek* Class Member executes and delivers, the Proof of Claim and Release.

7. All Representative Plaintiffs, Lead Plaintiffs and *Dusek* Class Members and each of them are hereby forever barred and enjoined from prosecuting any of the Released Claims against any of the Released Persons.

8. Upon the Effective Date, each of the *Dusek* Defendants and their respective Related Persons shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever released, relinquished and discharged the Representative Plaintiffs, Lead Plaintiffs, each and all of the *Dusek* Class Members and Plaintiffs' Counsel from all claims (including all Unknown Claims), relating to or arising out of, or connected with the institution, prosecution, assertion, settlement or resolution of the *Dusek* Action and/or the Released Claims, except that nothing herein shall affect any agreements, claims, rights, or obligations that or may hereafter exist between or among the Released Persons, or any of them.

9. The Court finds that the Notice given to the *Dusek* Class was the best notice practicable under the circumstances, including the individual Notice to all Members of the *Dusek* Class who could be identified through reasonable effort. Said Notice also provided the best notice practicable under the circumstances of those proceedings and of the matters set forth therein, including the proposed settlement set forth in the Stipulation, to all Persons entitled to such notice, and said Notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the requirements of due process.

10. Any Plan of Allocation submitted by Plaintiffs' Settlement Counsel or any order entered regarding the attorneys' fees and expense application shall in no way disturb or affect this Judgment and shall be considered separate and apart from this Judgment.

11. Neither the Stipulation nor the settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Stipulation or the settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claim, or of any wrongdoing or liability of any of the Released Persons; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Released Persons in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. The Released Persons or any of them may file the Stipulation and/or the Judgment in any action that may be brought against them in order to I support a defense or counterclaim based on principles of *res judicata,* collateral estoppel, release, good faith settlement, judgment bar or reduction or any theory of claim preclusion or issue preclusion or similar defense or counterclaim.

12. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of the settlement and any award or distribution of the Settlement Fund, including interest earned thereon, (b) disposition of the Settlement Fund; (c) hearing and determining applications for attorneys' fees, interest and expenses in the Actions; and (d) the Settling Parties for the purpose of construing, enforcing and administering the Stipulation and settlement.

13. The Court does not find that any party or counsel violated Federal Rule of Civil Procedure 11 or any state bar ethics provision.

14. In the event that the Effective Date does not occur or in the event that the Settlement Fund, or any portion thereof, is returned, then this Judgment shall be rendered null and void to the extent provided by and in accor-

dance with the Stipulation and shall be vacated and, in such event, all orders entered and releases delivered in connection herewith shall be null and void to the extent provided by and in accordance with the Stipulation.

IT IS SO ORDERED.

DATED September 29, 2003

MARIANA R. PFAELZER
THE HONORABLE MARIANA R. PFAELZER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Filed September 29, 2003
Master File No. CV-99-10864-MRP(CWx)
CLASS ACTION

FRANK A. DUSEK, et al., On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

—vs.—

MATTEL, INC., et al.,

Defendants.

Master File No. CV-99-10368-MRP(CWx)
CLASS ACTION

NORMA J. THURBER, et al., On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

—vs.—

MATTEL, INC., et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This litigation is comprised of two class actions brought on behalf of investors in Mattel, Inc., the *Dusek v. Mattel* case, which alleges violations of § 14(a) and § 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") against Mattel and certain of its officers and directors on behalf of persons who were entitled to vote on the merger of Mattel, Inc. ("Mattel") and The Learning Company, Inc. ("TLC"), and the *Thurber v. Mattel* case, which alleges violations of § 10(b) of the Exchange Act against Mattel and certain of its officers on behalf of purchasers of Mattel common stock during the period February 2, 1999 to October 1, 1999; and the related derivative action.

2. After more than three years of litigation, the parties reached a global settlement which provides for the payment of $122 million, plus interest, on behalf of the *Dusek* and *Thurber* classes, allocated $61 million to each class, and the adoption of certain corporate governance measures to settle the derivative action.

3. Notice of the terms of the settlement, the Plan of Allocation of the settlement proceeds and Representative Plaintiffs' counsel's application for fees and expenses was sent to more than 187,000 potential Class Members and a notice of the settlement of the related derivative action was sent to over 135,000 current holders of Mattel common stock.

4. The Ninth Circuit favors settlement of class action litigation. *Officers for Justice v. Civil Serv. Comm'n*, 688 Fad 615, 625 (9th Cir. 1982); *Van Bronkhorst v. Safeco Corp.*, 529 Fad 943, 950 (9th Cir. 1976); *see also Utility*

Reform Project v. Bonneville Power Admin., 869 F.2d 437, 443 (9th Cir. 1989).

5. In deciding whether to approve a proposed settlement, of a stockholders' class action under Federal Rule of Civil Procedure 23(e), the court must find that the proposed settlement is "fair, adequate, and reasonable. The factors which the Ninth Circuit instructs are to be considered in evaluating the fairness of a proposed class action settlement are summarized in *Officers for Justice*:

> Although Rule 23(e) is silent respecting the standard by which a proposed settlement is to be evaluated, the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable. The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

688 F.2d at 625 (citations omitted). *Accord Torrisi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

6. Taking into consideration these criteria to the extent applicable, the settlement is fair, reasonable, and adequate.

7. In deciding whether the proposed Settlement is fair, reasonable, and adequate this Court is not required to

determine contested issues of fact and law in the case, nor is it to determine what might have been the result after trial on the merits.

8. This litigation was vigorously prosecuted by plaintiffs Executive Committee and vigorously defended by defendants' counsel.

9. There is no indication that the settlement is the result of any fraud or collusion between the Representative Plaintiffs and defendants, or among their respective counsel.

10. The $122 million benefit results solely from plaintiffs' prosecution of the litigation and negotiations between the parties and does not result from any investigative or prosecutorial efforts by any governmental agency or any fund created by any governmental proceeding.

11. The corporate governance measures also result solely from the efforts of Derivative Settlement Counsel.

12. The creation of this Settlement Fund exhausts all of Mattel's possible insurance coverage, and also includes a payment directly by Mattel of more than $22 million, $20 million of which was necessary to fill a void created by the bankruptcy of one of Mattel's insurance carriers responsible for certain excess coverage. Mattel's insurance coverage was also a "wasting" asset and would have been further reduced significantly as a result of continued defense costs.

I. THE SETTLEMENT CONSIDERS THE STRENGTHS AND WEAKNESSES OF THE CASES AND THE RISKS OF LITIGATION

13. The risk of continued litigation and the probability of success on the merits on all claims warranted settlement rather than a full trial. There was no guarantee of success fox plaintiffs or the Classes had the cases gone to trial.

14. The burden of proof under § 10(b) is substantial. Under § 10(b), plaintiffs must establish that defendants made material misstatements or omissions, which caused injury to the members of the *Thurber* Class, and that defendants acted with scienter. In *Dusek*, under § 14(a), the parties vigorously disputed the applicable standard of conduct to which defendants should be held. Plaintiffs argued negligence was the standard; defendants argued it was scienter or actual knowledge. At the time of the settlement, the issue had not been finally resolved by this Court. Whichever standard was applicable to the § 14(a) claims, plaintiffs in both *Dusek* and *Thurber* faced significant risks in establishing liability.

15. To establish liability, plaintiffs would have been required to demonstrate that defendants made false and misleading statements or omitted to disclose material facts, that such information was material to investors in making their investment decisions, and that the false and misleading information would have affected the price of Mattel stock.

16. An example of one such issue in both the *Thurber* and *Dusek* cases is the issue of the due diligence on Mattel's acquisition of TLC. Plaintiffs' contention of a lack of due diligence must be contrasted with defendants claimed reliance oil a well-known investment banking

firm, Goldman Sachs. Plaintiffs also challenged the allegedly poor financial condition of TLC. Defendants, on the other hand, claimed that TLC's financial statements had been audited by an independent accounting firm which had given a clean audit opinion and that a special review of TLC did not result in evidence of misconduct.

17. Defendants raised arguments which, at summary judgment or at trial, this Court or a jury could have found plausible. Such potential defenses could have resulted in plaintiffs obtaining a smaller recovery at trial or no recovery at all.

18. The existence of potential defenses to these and other claims of plaintiffs supports experienced counsel's recommendation in favor of approval of the settlement.

19. Even if plaintiffs demonstrated liability, damages were uncertain. Both plaintiffs' and defendants' damage experts undoubtedly would have presented opposing views as to the existence and amount of damages for a jury to consider in both the *Dusek* and *Thurber* cases. The uncertainty as to such outcome weighs in favor of settlement.

20. The settlement confers a substantial benefit on the *Dusek* and *Thurber* Classes.

II. STAGE OF THE PROCEEDINGS AND AMOUNT OF DISCOVERY

21. The settlement is also fair, reasonable, and adequate when taking into consideration the stage of the proceedings and the amount of discovery that had been completed. The stage of the proceedings here was sufficiently advanced for plaintiffs and defendants to make

a reasoned determination as to the strengths and weaknesses of their cases.

22. The parties had litigated two rounds of motions to dismiss in both the *Dusek* and *Thurber* cases. The Court dismissed the original complaints and plaintiffs amended their complaints. Defendants also moved to dismiss the amended pleadings. After denial of defendants' motions, defendants answered the *Thurber* and *Dusek* complaints, denying all material allegations of the complaints and raising twenty-five affirmative defenses to the *Thurber* complaint and twenty-nine affirmative defenses' to the *Dusek* complaint.

23. Plaintiffs also engaged in considerable investigation, including interviews of over a hundred former employees of Mattel, TLC, and third parties.

24. The parties also took substantial documentary discovery of defendants and third parties (including the subpoenaing of over 70 third parties) resulting in the production of over one million pages of documents. The parties litigated numerous discovery disputes before the Discovery Master, with some hearings extending over multiple days in order to resolve these disputes.

25. Plaintiffs and defendants conducted over forty depositions of parties and third-party witnesses.

26. Plaintiffs and defendants also retained experts on relevant issues.

27. Plaintiffs and defendants conducting the settlement negotiations were well informed about the merits of the case, the likelihood of possible recovery, and the risks posed by possible success of defendants' defenses.

III. SETTLEMENT NEGOTIATIONS

28. The parties negotiated the settlement under the auspices of the Court-appointed mediator.

29. The Court ordered the parties to mediation on December 21, 2001 before an independent, neutral mediator, Charles G. Bakaly, Jr. of JAMS, a well-known dispute resolution organization. Mr. Bakaly also served as Discovery Master for discovery disputes between the parties.

30. After months of discovery, including the production, of documents by defendants and over seventy third parties, responses to interrogatories, and over forty depositions,, the parties negotiated the settlement.

31. The participants in the settlement negotiations were senior lawyers from firms representing plaintiffs and defendants. Each of them was highly experienced in negotiating settlements of complex cases. Insurance carriers for Mattel were also present at the mediation sessions.

32. The Lead Plaintiffs and Representative Plaintiffs actively participated in the litigation, consulting with counsel, and being present, either in person or by telephone, in Court hearings and/or the settlement discussions.

33. The settlement resulted from intensive arm's-length negotiations.

IV. RECOMMENDATION OF COUNSEL

34. The recommendations of experienced counsel favors approval of the settlement.

35. Plaintiffs' Executive Committee and counsel for defendants are highly experienced in the prosecution and defense of securities class actions. They negotiated the settlement at arm's length. The fact that such competent counsel support the settlement is a factor in support of approval of the settlement, the allocation of the settlement between the two classes, and the Plan of Allocation to distribute the Net Settlement Fund.

V. LIKELY EXPENSE AND DURATION OF FURTHER LITIGATION

36. The settlement must also be viewed against the expense and delay of obtaining a larger amount at trial.

37. Absent this settlement, the litigation would certainly continue to be vigorously contested. Both plaintiffs and defendants demonstrated the willingness and commitment to prosecute and defend the case through trial and beyond, if necessary. The parties indicated that appeals of a trial verdict would undoubtedly be taken. Trial and subsequent appeals would have delayed any recovery for the Classes for years. Additionally, further litigation would be extremely expensive, with no guarantee of a more favorable recovery, or even any recovery at all at trial. Delay also involved the risk of fading memories on the part of witnesses as time progressed, since testimony concerned events which occurred four or five years ago. The settlement also avoids the risk of reversal on appeal of a larger trial verdict. The settlement provides a significant present recovery, without the risk, expense, and delay of prosecuting the case through trial and post-trial appeals. This factor warrants approval of the settlement.

VI. THE ALLOCATION OF THE $122 MILLION BETWEEN THE CLASSES

38. The strengths and weaknesses of both the *Thurber* and *Dusek* classes support the allocation of the $122 million settlement, $61 million to Thurber and $61 million *to Dusek.*

39. Beatie and Osborn LLP's ("Beatie and Osborn") argument that the claimed lower standard of proof in the *Dusek* case indicates that the allocation of $61 million to the *Dusek* Class is insufficient, is without merit. As the Third Circuit noted in *In re Cendant Corp. Litig.*, 264 F.3d 201, 219 (3d Cir. 2001), *cert. denied*, 535 U.S. 929, 122 S. Ct. 1300, 152 L. Ed. 2d 212 (2002):

> We then turn to the objections regarding the allocation of the settlement fund. One objector contends that the claims under § 11 of the Securities Act of 1933, which only a subset of the class possesses, are legally stronger than the other claims held by class members, i.e., claims under § 10(b) of the Securities Exchange Act of 1934. Based on this disparity, the objector argues that the § 11 claimants should receive a larger share of the settlement proceeds. We conclude, however, that the § 11 claims here are not necessarily legally stronger than the § 10(b) claims, and that, at any rate, the basis for measuring the different legal strengths of the claims involved is too speculative to support the objector's contention. We thus hold that the District Court did not abuse its discretion in approving a settlement allocation that treated all claims more or less equally.

40. The division of the $122 million settlement of $61 million to the Thurber Class and $61 million to the *Dusek* Class is a reasonable allocation based on various

factors present in the cases, including varying standards of proof (whether negligence, scienter, or actual knowledge under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-5(c)(1)(B) the number and strength of the statements at issue, defendants different defenses to the various statements in the two cases, additional defenses potentially applicable to the proxy claims (including issues related to arguably forward-looking statements in the Proxy Statement), the potential applicability of the "subjective falsity" standard of *Virginia Bankshares v. Sandberg*, 501 U.S. 1083 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991), damages, and potentially other factors.

VII. BEATIE AND OSBORN'S OBJECTIONS ARE WITHOUT MERIT

41. Neither the Lead Plaintiffs nor Representative Plaintiffs' counsel have a potential or actual conflict of interest.

42. No potential or actual conflict of interest existed or exists as to the different claims raised in the *Thurber* and *Dusek* cases.

43. No facts have been shown indicating any conflict on the part of either the Lead Plaintiffs or Representative Plaintiffs' counsel.

44. The Lead Plaintiffs had the largest financial interests of the investors who sought to be appointed as lead plaintiffs in the *Dusek* and *Thurber* classes and were properly appointed as Lead Plaintiffs under the PSLRA.

45. The Lead Plaintiffs fully and fairly protected the interests of the *Thurber* Class and the *Dusek* Class.

46. Wolf Popper LLP vigorously prosecuted the *Dusek* action and zealously represented the interests of the *Dusek* Class members.

47. The Class Representatives vigorously prosecuted the *Thurber* action and the *Dusek* action and are adequate representatives of the Classes.

48. Representation of two classes does not create an impermissible conflict of interest.

49. The fact that the standards of proof under § 10(b) and § 14(a) may differ does not raise a conflict of interest.

50. Class representatives may represent classes with different claims or different standards of proof.

51. The substantial recovery obtained by the Lead Plaintiffs and counsel in the *Dusek* case supports the finding that there was no actual or potential conflict.

52. The Schiff Group were not appropriate lead plaintiffs or class representatives for the *Dusek* Class and would not have been adequate representatives of the *Dusek* Class.

53. Beatie and Osborn was not appropriate counsel for the *Dusek* Class.

54. Although Beatie and Osborn allege that the *Dusek* class representatives have a conflict of interest, two of the three class members proposed by Beatie and Osborn to be representatives of the *Dusek* Class have the same interests.

55. Beatie and Osborn raise no factual basis suggesting a conflict of interest on the part of the *Dusek* class representatives or on the part of counsel.

56. Beatie and Osborn raise no facts suggesting or showing that the *Dusek* Class obtained a smaller settlement than it would have had the Executive Committee not been appointed, and Wolf Popper not been appointed as counsel with primary responsibility to represent the *Dusek* Class.

57. The filing of a joint fee application by the members of the Executive Committee of Plaintiffs' Counsel does not give rise to or evidence a conflict of interest.

58. The objections of The Schiff Group are without merit and are overruled.

VIII. FAVORABLE REACTION FROM CLASS MEMBERS

59. The favorable reaction of the Classes also supports approval of the settlement and the allocation of $61 million to each class. Although over 187,000 copies of the Notice of Pendency and Settlement of Class Actions (the "Notice") were mailed to potential members of the Classes and a summary notice of the settlement was also published in the national edition of *Investor's Business Daily*, the only objections filed with this Court are two objections (dealt with below) to the fee applications of Plaintiffs' Counsel and the objections filed by counsel for The Schiff Group.

60. The Classes include, in addition to individuals, sophisticated financial institutions such as mutual and pension funds.

61. Lead Plaintiffs also have each submitted a declaration in support of the settlement. These Lead Plaintiffs include an institutional investor and other investors who allegedly suffered significant losses as a result of their investments in Mattel.

62. The lack of any objections from virtually all persons in both Classes[1] is a factor in evaluating the fairness, reasonableness and adequacy of the settlement. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

63. For the reasons set forth at the Settlement Hearing, the papers submitted in support of the settlement by Plaintiffs' Counsel and defendants' counsel, and herein, the Court finds that the settlement is fair, reasonable and adequate and in the best interests of the Classes.

IX. THE PLAN OF ALLOCATION

64. The Net Settlement Fund is to be distributed according to the Plan of Allocation among Class Members who submit timely, valid Proof of Claim forms and only to Class Members who have a net loss on all transactions in Mattel securities.

65. A plan of allocation of proceeds in a settlement in a class action must be fair, reasonable and adequate.

66. The objective of a plan of allocation is to provide an equitable basis upon which to distribute a net settlement fund among eligible claimants.

67. The goal of an equitable plan of allocation is fairness to the classes as a whole, taking into consideration the strength of claims based on available facts and evidence, as well as the size of the fund to be distributed. The Plan of Allocation in this case is based on such principles and falls within the mainstream of allocation plans routinely approved. The Plan of Allocation is also recommended by experienced and competent class counsel.

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[1] The objections raised by The Schiff Group are dealt with supra, at pp. 8-9.

68. The Plan of Allocation is equitable to all members of the *Thurber* and *Dusek* classes and is a fair and equitable method of allocating the proceeds of the Net Settlement Fund among Class Members. The Plan of Allocation is not the product of collusion among the parties.

69. The lack of any objection to the Plan of Allocation' suggests that approval of the Plan of Allocation[2] is warranted.

X. APPLICATIONS BY PLAINTIFFS' COUNSEL FOR ATTORNEYS' FEES REIMBURSEMENT OF EXPENSES

70. Representative Plaintiffs' counsel seek an award of attorneys' fees from the Settlement Fund on a percentage bash.

71. A reasonable percentage of the fund recovered is the appropriate method to use in awarding attorneys' fees in this litigation.

72. Representative Plaintiffs' counsel seek an award of 27% of the Settlement Fund as attorneys' fees.

73. An award of attorneys' fees in the amount of 27% is fair and reasonable for the following reasons:

- The $122 million benefit obtained for the Classes is an excellent benefit, one of the larger settlements under the PSLRA.
- The Executive Committee diligently prosecuted the cases. Representative Plaintiffs' counsel

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[2] The Schiff Group does not object to the Plan of Allocation for the distribution of the Net Settlement Fund, only to the allocation of the Settlement Fund between the two classes.

drafted comprehensive complaints and memoranda of law concerning difficult and novel issues, conducted formal and informal discovery, reviewed documents and took depositions, conducted discovery conferences; attended Court hearings and numerous hearings before the Discovery Master, arguing numerous motions, and conducted meaningful settlement discussions.

- Both the *Thurber* and *Dusek* cases were fraught with inherent risk factors and success for the plaintiff Classes was not assured.
- There were risks as to whether plaintiffs would be able to establish liability on the part of defendants.
- The risk factors to a successful resolution included: difficulties in establishing liability and the legally required state of mind of defendants, who were represented by law firms highly regarded for their skill in defending securities class actions; and if plaintiffs succeeded in establishing liability on the part of defendants, there were risks as to whether, and to what amount and extent, plaintiffs would be able to establish damages, including the amount of inflation of the stock price of Mattel due to the alleged wrongdoing on the part of defendants.

74. Representative Plaintiffs' counsel addressed complex factual and legal questions, including issues related to liability and whether defendants acted with scienter, negligence, recklessness, actual knowledge, or whether their statements were "subjectively false" (indeed, in the

context of the *Dusek* case, there were a variety of possible applicable standards of conduct that had not been addressed by this Court before in a § 14(a) case).

75. The contingent nature of the litigation and the financial burden undertaken by Representative Plaintiffs' counsel in achieving the settlement must be considered in awarding a fair and reasonable fee.

76. In this litigation, Representative Plaintiffs' counsel undertook this litigation on a wholly contingent basis and faced significant risk of an unsuccessful resolution of these cases. They have also received no compensation for their services during the course of the almost four years since the commencement of these cases and have incurred very significant expenses for the benefit of the Classes.

77. Representative Plaintiffs' counsel represented the *Dusek* and *Thurber* Classes in a very capable and professional manner.

78. Under the circumstances present here, Representative Plaintiffs' counsel are entitled to the award of a reasonable percentage of the common fund obtained for the benefit of the Classes.

79. The support of the Representative Plaintiffs of the fee application of Plaintiffs' Counsel warrants due consideration by this Court. The Representative Plaintiffs have filed Declarations supporting an award in the amount of 27%.

80. Representative Plaintiffs' counsel also seek reimbursement of expenses incurred in prosecuting these actions in the aggregate amount of $2,211,745.02. This amount includes the fees and expenses of investigators, consultants, and experts whose services were utilized in

the prosecution of these cases to assist Representative Plaintiffs' counsel. Other expenses are detailed in the memorandum in Support of Application for Attorneys' Fees and Reimbursement of Expenses.

81. The aggregate amount of expenses for which reimbursement is sought is less than the $2.6 million in expenses indicated in the Notice. These expenses were reasonably and necessarily incurred to obtain this $122 million settlement.

82. Under all of the circumstances present here, a 27% fee plus expenses in the amount of $2,211,745.02 is fair and reasonable.

83. From this award of fees and expenses, Weiss & Yourman is entitled to $725,000.00 in fees and $76,626.49 in expenses. Weiss & Yourman has not justified its request for $1,719,661.10 in fees and $76,626.49 in expenses.

84. Also, as allowed under the PSLRA, the Lead Plaintiff's, Birmingham Retirement & Relief Fund, Hugh DeLozier, Mollie DeLozier, and Dr. Glenn Bauer seek reimbursement for their time and expenses in the amounts of $17,426.75, $50,000, $50,000, and $49,800, respectively. The Notice informed Class Members that certain of the Lead Plaintiffs might seek compensation of up to $50,000 each for their time and expenses incurred in prosecuting the Litigations. No objections were received to such applications.

85. Named plaintiffs Norma J. Thurber and Frank A. Dusek also seek reimbursement for their time and expenses as a result of defendants' depositions and discovery taken of them, in the amount of $3,685 and $8,000, respectively.

86. The Lead Plaintiffs and Representative Plaintiffs complied with their responsibilities under the PSLRA and, expended time, effort, and resources in pursuit of a recovery for all Class Members herein. The Lead Plaintiffs' investments of time, effort and expenses significantly contributed to the successful result of this litigation and they are entitled to the reimbursement sought under the PSLRA.

87. The named plaintiffs also participated in the discovery demanded by defendants and allowed by the Discovery Master and their applications for reimbursement for their time and expenses are also allowed.

XIII. OBJECTIONS TO THE FEE APPLICATIONS

88. Two members of the Classes filed objections to the fee applications of Plaintiffs' Counsel, Lillian Collins, through her attorney, Nicholas M. Fausto ("Fausto Objections"), and Richard T. Pohl, through his attorney, Douglas A. Cole ("Cole Objections") These objections were not made to the fee applications of Plaintiffs' Counsel as filed, but to fee applications in general, and do not take into consideration the facts of these cases in particular and the risks undertaken by Plaintiffs' Counsel.

89. The Fausto Objections that "the risk of non recovery is grossly exaggerated" and the Cole Objections that "there was little risk for plaintiffs' counsel in litigating this case," "[p]roving the case was a simple matter of comparing the press releases and statement[s] to the documented facts," and that there was "relative ease in obtaining the settlement," are contradicted by the facts and history of this more than three year long, contentious litigation. Nor was there any governmental

investigation of Mattel or TLC upon which this litigation was predicated.

90. The Court finds the Fausto Objections and the Cole objections to be without merit and they are denied.

DATED: September 29, 2003

MARIANA R. PFAELZER
THE HONORABLE MARIANA R. PFAELZER
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment provides in part:

   No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

2. Rules 23(a)(4) of the Federal Rules of Civil Procedure provides:

   One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.

3. Rule 23(g)(1)(B) of the Federal Rules of Civil Procedure provides:

   An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(2)

No. 05-546

In The

Supreme Court of the United States

MEL SCHIFF,

Petitioner,

v.

FRANK A. DUSEK, on behalf of himself and all others similarly situated; HUGH DELOZIER, Dr. and Mrs.; STATE STREET BANK; BIRMINGHAM RETIREMENT & RELIEF FUND, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether this Court should grant certiorari in a case in which an unpublished affirmance of an arm's-length class action settlement (brokered by a court-appointed mediator) reveals no disagreement among the circuits, no discernible question of constitutional concern, and Petitioner's chief disagreement is with the (unrebutted) factual findings of the lower court.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	3
THE COURSE OF PROCEEDINGS	4
REASONS FOR DENYING THE PETITION	6
A. There is No Conflict in the Circuits at Issue, and No Dispute Concerning Unsettled Questions of Constitutional or Federal Statutory Law	6
B. The Petition Ignores or Disputes the Factual Findings of the Courts Below and Is Misdirected	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amchem Products v. Windsor, 521 U.S. 591 (1997) 10

In re Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001), *cert. denied*, 535 U.S. 929 (2002) 8

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 9

Virginia Bankshares v. Sandberg, 501 U.S. 1083 (1991) 5

FEDERAL STATUTES AND RULES

Fed. R. Civ. P. 23(a)(4) 1

Fed. R. Civ. P. 23(e)(1)(C) 1

Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4 4

Securities Exchange Act of 1934, 15 U.S.C. §78j(b) 3

Securities Exchange Act of 1934, 15 U.S.C. §78n(a) 3

OTHER AUTHORITIES

Ninth Circuit Local Rule 36-3 5

WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 269 (1987) 6

Supreme Court Rule 10 6

INTRODUCTION

In a decision without dissent, the Ninth Circuit held that the District Court did not abuse its discretion in determining that the $122 million settlement in this consolidated class action, divided equally between a §10(b) ("*Thurber*") class and a §14(a) ("*Dusek*") class, was fair, adequate and reasonable under Fed. R. Civ. P. 23(e)(1)(C), and that the respective class representatives for the classes were adequate pursuant to Fed. R. Civ. P. 23(a)(4). (3a-7a.) As the Ninth Circuit noted, Petitioner Mel Schiff ("Schiff"), who is the sole objector to the settlement, does not dispute that the $61,000,000 allocated to the §14(a) class is apparently one of the largest settlements of a §14(a) class action in history.[1] (6a.)

There are no grounds to grant this Petition for certiorari to review the lower courts' approval of the *Dusek* settlement.[2] The Ninth Circuit rejected each of Schiff's contentions of "conflict" *seriatim*, holding that "the record suggests otherwise." (6a.) Thus, the Court of Appeals found that the issue of "conflict," raised by Schiff, rested on an overstatement of the facts in the record: "Schiff overstates the degree to which there was a potential or

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[1] Schiff, who owns a mere 30 shares of Mattel, Inc. ("Mattel") common stock, testified at his class deposition that he was unaware that his counsel, Beatie and Osborn ("Beatie"), had taken any action on his behalf, and that he had not authorized any action in this case other than signing a certification he believed simply entitled him to share in any recovery, after which he had not spoken to Beatie in 2½ years until his deposition. Not surprisingly, the District Court ultimately held Schiff to be an inadequate representative and his counsel to be inadequate counsel – a holding his Petition omits.

[2] Schiff is a member of the *Dusek* class, not the *Thurber* class. Nevertheless, he devotes most of his Petition to attacking the lead counsel in charge of prosecuting the *Thurber* case.

actual conflict of interest between the *Dusek* [§14(a)] class and the *Thurber* [§10(b)] class." (5a.)

Further, there is no issue presented by this Petition that implicates either a split in any of the Circuit Courts of Appeal, or any significant, far-reaching, constitutional or national concerns, meriting this Court's attention. While devoting most of his petition to *ad hominem* attacks on counsel (the Milberg Weiss firm) responsible for prosecuting the *Thurber* §10(b) case (apparently for perceived grievances totally unrelated to *this* case), Schiff wholly ignores that, at the lead plaintiff stage in the beginning of this litigation, the District Court appointed a *different* law firm, Wolf Popper LLP ("Wolf Popper"), to be in charge of the prosecution of the *Dusek* §14(a) class case, and that the class representatives in the *Dusek* action were appropriately certified. Schiff also completely ignores that Wolf Popper ***in fact*** zealously prosecuted the §14(a) case, as the District Court specifically found – a finding the Court of Appeals properly held was manifestly in the District Court's purview. (5a.)[3]

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[3] The District Court was fully aware that the cases were meticulously prosecuted throughout with great sensitivity to the different claims. Wolf Popper, in primary charge of the §14(a) case, directed, and oversaw all the strategic decisions in that action. The oppositions to defendants' motions to dismiss the §14(a) claims and amended claims were prepared and argued by Wolf Popper; following the denial of the second motions to dismiss, Wolf Popper conducted the discovery and numerous depositions in the case which related to the §14(a) claims and argued for the *Dusek* class at all hearings affecting the §14(a) claims. Wolf Popper was also the primary negotiator for the §14(a) claims in the mediation sessions, which included the mediation of the allocation. In short, there was no hearing, motion, discovery matter, meet-and-confer session, or any other significant event in this litigation which implicated the §14(a) case, in which Wolf Popper was not involved, and, as to

(Continued on following page)

Schiff does not and cannot establish any reason for the Court to grant certiorari to review the District Court's approval of the $122-million settlement or the allocation of the settlement fund between the *Dusek* and *Thurber* classes, a decision made on facts unique to this case, based on a tired argument already reviewed nine times by at least six different judges.[4]

STATEMENT OF THE CASE

The class action in *Dusek v. Mattel, Inc.*, District Court Master File No. CV-99-10864-MRP (CWx) ("*Dusek*"), asserts claims under §14(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78n(a), on behalf of owners of Mattel, Inc. stock as of March 15, 1999, the record date for shareholders to be entitled to vote on the merger of Mattel and The Learning Company, Inc. ("TLC") ("Merger"). The related class action in *Thurber v. Mattel, Inc.*, District Court Master File No. CV-99-10368-MRP (CWx) ("*Thurber*"), asserts claims under §10(b) of the Exchange Act, 15 U.S.C. §78j(b), on behalf of persons who purchased Mattel stock during the class period of February

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the §14(a) case, Wolf Popper made all the strategic decisions for the benefit of the §14(a) claimants. Findings ¶¶41-46 (25a-26a).

[4] Schiff's counsel Beatie has asserted the same alleged "conflict" argument nine times in this case in seeking his clients' appointment as lead plaintiff, rehearing of the lead plaintiff motion, a writ of mandamus from the Ninth Circuit, a cross-motion for appointment of class representative and class counsel, petition to appeal to the Ninth Circuit therefrom, opposition to preliminary settlement approval, seeking discovery of the mediation proceedings before a magistrate judge, opposition to the final settlement approval, and the Ninth Circuit appeal therefrom. Not one of the judges or magistrate judges reviewing his contentions found any merit to his arguments.

2, 1999 through October 1, 1999 ("Class Period"). Both actions arose out of the disastrous financial condition of Mattel/TLC and the failed Merger between Mattel and TLC. Mattel's acquisition of TLC is at the heart of both cases. Thus, although brought and maintained as separate actions, the cases were coordinated and prosecuted jointly, with the District Court's blessing.[5]

THE COURSE OF PROCEEDINGS

Pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which provides for the appointment of shareholders with the largest financial interest as lead plaintiffs to control the litigation, the District Court appointed as lead plaintiffs an institution and individuals who suffered losses of approximately $2 million.[6]

In the lead plaintiff order, which Schiff ignores in his Petition, in addition to appointing an Executive Committee, the District Court directed that Wolf Popper LLP (whose clients, the DeLoziers, had a much larger financial claim

[5] Schiff ignores that, as he conceded at oral argument before the Ninth Circuit, there is substantial overlap between the two classes. (3a) Many members of the *Thurber* class are also members of the *Dusek* class – including two of the three representatives of the Schiff Group that Beatie had proposed as class representatives.

[6] Based on their large financial interests, the District Court appointed Birmingham Retirement & Relief Fund ("Birmingham") and Dr. and Mrs. Hugh DeLozier (who were plaintiffs in both *Dusek* and *Thurber*), State Street Bank (a plaintiff in *Dusek* only), and Glen and Julie Bauer (plaintiffs in *Thurber* only), as Lead Plaintiffs in the litigation. State Street Bank subsequently withdrew as a lead plaintiff. The Schiff Group proposed by Beatie, with its 147 unrelated individuals, each with small shareholdings, had no prospect of ever becoming lead plaintiff. The "Group" shrunk to three persons during class certification proceedings, and down to Schiff alone after those three persons were deposed.

under §14(a) than under §10(b) – a fact which the Ninth Circuit noted Schiff did not dispute), "will have primary responsibility for prosecuting the §14(a) claim." (App. 3.)

Later, in allocating the global settlement, the valuation of the §14(a) claim was particularly complex and factually based. With the help of an independent, court-appointed mediator, an allocation was reached in which, as the Court of Appeals noted, the §14(a) class is anticipated to receive *more* per share than the §10(b) class.[7]

Schiff appealed the final approval of the settlement, asserting the same arguments he repeats in his Petition. The appeal was briefed in 2004 and argued in April 2005. On July 29, 2005, the Ninth Circuit affirmed the District Court's approval of the settlement, rejecting Schiff's argument, in a 3-0 unpublished opinion. The Ninth Circuit examined and set forth how the factual record contradicted Schiff's argument, and determined not to publish its unanimous decision for lack of precedential value.[8]

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[7] The District Court cited examples of numerous other factors ignored by Schiff that had to be considered in arriving at an allocation, such as "the number and strength of the statements at issue, defendants['] different defenses to the various statements in the two cases, additional defenses potentially applicable to the proxy claims (including issues related to arguably forward-looking statements in the Proxy Statement), the potential applicability of the 'subjective falsity' standard of *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991), damages, and potentially other factors." Findings, ¶40 (24a-25a).

[8] Ninth Circuit Local Rule 36-3 provides that unpublished dispositions "are not binding precedent." Thus, not only did the Ninth Circuit consider the opinion too insignificant to publish, but, under current Ninth Circuit rules, an unpublished order lacks value as precedent in any event. Thus, the order that the Court is being asked to review has no precedential value at all.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict in the Circuits at Issue, and No Dispute Concerning Unsettled Questions of Constitutional or Federal Statutory Law

Schiff's Petition, saturated with unprofessional venom and innuendo, clearly does not rise to a level meriting the Court's grant of certiorari. Schiff does not contend that there is a split in the Circuit Courts on any issue in his Petition, and there is none. Similarly, there are no issues involving "unsettled questions of federal constitutional or statutory law of general interest." (REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS, 269 (1987).) The approval of the settlement of this hard-fought litigation was undertaken by a District Court intimately familiar with the case, and upon careful and reasoned consideration of all factors, set forth in detailed findings. There is no disagreement as to constitutional or statutory principles at issue here, only Petitioner's disagreement as to how the facts were viewed by the courts below in the unique circumstances of this case. That disagreement presents a poor foundation on which to lay a petition for certiorari – for this Court "rarely grant[s]" petitions "when the asserted error consists of erroneous factual findings." *See* S. Ct. Rule 10.

The District Court's ruling was inextricably linked with the facts of this case, such that if the Court accepted Schiff's invitation to change the outcome of the case, it would in effect have to overturn several of the factual findings of the courts below (as evidenced by the fact that the Ninth Circuit, in addressing and rejecting Schiff's contention that class counsel and the class representatives were inadequate, stated that "the record suggests otherwise.") (6a.) No

evidence whatsoever in the record has been put forth by Petitioner to suggest that the Court of Appeals decision was wrong and deserves further review by this Court.

B. The Petition Ignores or Disputes the Factual Findings of the Courts Below and Is Misdirected

As noted, Schiff ignores that Wolf Popper was placed in charge of the *Dusek* §14(a) case. He also ignores that Wolf Popper, as counsel for the *Dusek* class, disputed with *Thurber* counsel the allocation of the settlement between the *Dusek* and *Thurber* classes, and, when they could not agree, proceeded to mediation of the issue before the court-appointed Mediator, Charles G. Bakaly, Jr. of JAMS.[9] Based on all factors impacting both cases, and with the assistance of the Mediator, counsel in charge of both the *Thurber* and *Dusek* cases, respectively, and the Lead Plaintiffs, ultimately agreed to the allocation which was then scrutinized and approved by the District Court.[10]

Schiff also ignores that the District Court and the Court of Appeals found that the "conflict," if any, was more theoretical than real, since, among other things, the *Dusek* Class Representatives, the DeLoziers, had a §14(a) claim

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[9] Contrary to Schiff's wild speculation, Wolf Popper was most certainly ***not*** beholden to the Milberg Weiss firm for fees, and, to the contrary, had every expectation that its fee would increase the more it was able to obtain in recovery for the *Dusek* class. Schiff's speculation is patently untrue and, in any event, is an issue of fact that is an insufficient basis for a grant of certiorari.

[10] Contrary to Schiff's suggestion of "secrecy" regarding the factors that bore on the allocation, those factors were publicly discussed in numerous court filings in this case, including papers submitted on the motions for preliminary approval and final approval of the settlement.

which was much larger than their §10(b) claim, and had every incentive to maximize the recovery for their largest claim.

Before the District Court, Schiff's sole argument in support of his contention that the *Dusek* class allegedly received an insufficient amount of the settlement proceeds was that the §14(a) claim was based on a negligence standard, while the §10(b) case was based on a scienter standard, and therefore, the §14(a) claim was stronger than the §10(b) claim. However, as the District Court found, this simplistic approach ignored a host of complicated other factors in the two cases considered by the various counsel in the cases, the Mediator, and the District Court. Indeed, a case cited by Schiff, *In re Cendant Corp. Sec. Litig.*, in the later Third Circuit opinion, explains the inadequacy of a contention nearly identical to Schiff's, and was cited by the District Court in overruling Schiff's objection.[11] Thus, based on all the unique factors in this case (which Schiff ignores in his

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[11] *See In re Cendant Corp. Litig.*, 264 F.3d 201, 219 (3d Cir. 2001), *cert. denied*, 535 U.S. 929, 122 S. Ct. 1300, 152 L. Ed. 2d 212 (2002):

> We then turn to the objections regarding the allocation of the settlement fund. One objector contends that the claims under §11 of the Securities Act of 1933, which only a subset of the class possesses, are legally stronger than the other claims held by class members, *i.e.*, claims under §10(b) of the Securities Exchange Act of 1934. Based on this disparity, the objector argues that the §11 claimants should receive a larger share of the settlement proceeds. We conclude, however, that the §11 claims here are not necessarily legally stronger than the §10(b) claims, and that, at any rate, the basis for measuring the different legal strengths of the claims involved is too speculative to support the objector's contention. We thus hold that the District Court did not abuse its discretion in approving a settlement allocation that treated all claims more or less equally.

Certiorari was denied in that case, and it should be denied here.